TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 55

THE PEP BOYS, MANNY, MOE & JACK OF CALIFORNIA, APPELLANTS,

vs.

PYROIL SALES COMPANY, INC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED MAY 13, 1936.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPERIOR COURT OF LOS ANGELES COUNTY

No. 372896

PYROIL SALES COMPANY, INC., a Corporation, Plaintiff,

vs.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA, a Corporation, Defendant

COMPLAINT FOR RESTRAINING ORDER AND INJUNCTION—Filed April 26, 1934

The petition of plaintiff, Pyroil Sales Company, Inc., a corporation, respectfully shows:

I

That petitioner is, and at all times herein mentioned, was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, state of California.

II

That the defendant is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

III

That the petitioner, by virtue of contracts with the manufacturer and distributor, has the sole right to sell and dis- [fol. 2] tribute in southern California, including the Counties of Los Angeles, Orange, San Diego, Imperial, Riverside, San Bernardino, Santa Barbara and Ventura, a commodity named and designated as Pyroil, which bears distinctive trademarks, names, labels and copyrights, together with the good will pertaining thereto and the exclusive

right to the use, in said counties, of said trademarks, names, labels and copyrights.

IV

That Pyroil is manufactured, patented and guaranteed by the Pyroil Company, La Crosse, Wisconsin, under United States Patent Numbers 1877668 and 1879874, and that Pyroil is a Heat-Proof Lubrication Process which is a highly specialized, concentrated lubricant embodying an effective carbon solvent and a new patent-protected liquefied graphite, soluble in gasoline in its liquid form, yet impervious to heat or wet-gas dilution when rubbed into the pores of the bearing metal surfaces, and composed only of the finest lubricating elements.

V

That the said Pyroil products for several years have been a well established commodity through advertising in national publications, such as The Saturday Evening Post, Time, Maclean's (Canada), the radio, automobile races, dryrun tests, and many other means;

That the said Pyroil products enjoy and have enjoyed [fol. 3] for several years good reputation among dealers, retailers and consumers.

VI

That the manufacturer, Pyroil Company, of LaCrosse, Wisconsin, ships its Pyroil products from its factories to California, where it warehouses said products and shipments in bonded warehouses, and that plaintiff obtains its Pyroil products from such bonded warehouses and in turn warehouses the same at its local points of distribution and marketing.

VII

That there has developed in the automobile accessory trade in California a practice of cutting the price of well established and advertised commodities, well known to the public, and identified under distinctive trademarks, names, labels and copyrights;

That such products at such cut prices were and are used as so-called "leaders" or "loss leaders" to attract people and prospective purchasers into automobile accessory es-

tablishments, depending upon those so attracted to make purchases of other goods and similar articles which yield sufficiently large profits to make up for losses involved in such cut prices.

VIII

That to remedy this evil, the State Legislature of California in 1931 passed an act entitled, "An Act to protect trade mark owners, distributors and the public against in-
[fol. 4] jurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name";

That said Act was amended in 1933 by the addition of a section numbered "1½", which forbids any person from

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person aggrieved."

IX

That plaintiff, to protect itself and the public against the injurious and uneconomic practices recognized by said Act, and the amendment thereof, adopted a system of doing business which consisted of entering into contracts with dealers in southern California and the counties herein mentioned, obligating the latter to sell plaintiff's Pyroil products only to consumers at specified prices;

That the prices so stipulated in such contracts are, in fact, fair and reasonable, and that practically all dealers and retailers in southern California have executed such contracts with plaintiff;

That as a result of such contracts and method of merchandising, plaintiff enjoys a reasonable profit in the sale of its products, immunity from injurious and uneconomic price cutting, unobstructed distribution of its products, and the public has benefited through reasonable prices and high
[fol. 5] quality enabled by consequent volume production;

That as a result of such method of distribution and merchandising, dealers in said products obtain a reasonable compensation for their services;

That plaintiff refuses to sell its products to dealers and retailers who do not execute such contracts.

X

That the defendant, operating six (6) retail stores in the cities of Los Angeles, Glendale, Huntington Park and Long Beach, County of Los Angeles, State of California, with the purpose of interfering with, and disrupting, plaintiff's said contracts and business, have knowingly and wilfully advertised, offered for sale and sold said Pyroil products at less than the prices stipulated in said contracts;

That in so doing, the defendant knew of the said contracts, and that previously to such advertising, offering for sale and selling by defendant, it has always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers, but had not done so, and obtained said products in ways unknown to plaintiff and against plaintiff's will.

XI

That the prices of Pyroil products in California, whether "Pyroil A", "Pyroil B", or "Pyroil W", established by the manufacturer, are as follows:

$1.00 in lithographed and trademarked Pint containers,
[fol. 6] 1.75 in lithographed and trademarked Quart containers,
6.00 in lithographed and trademarked Gallon containers.

XII

That on the 19th day of April, 1934, in a daily newspaper in circulation in the City and County and Los Angeles known as the Los Angeles Evening Herald and Express, defendant advertised "Genuine Pyroil" for sale at its six retail stores in Los Angeles County, at the following prices:

"49¢—1-Pint Can,
89¢—1-Quart Can,"

and did thereafter, and until the 23rd day of April, 1934, offer for sale and sell "Genuine Pyroil" in the manufacturer's original and sealed containers, at its said stores and for the prices so advertised in the Los Angeles Evening

Herald and Express in its various editions of April 19, 1934.

XIII

That on the 23d day of April, 1934, defendant changed its prices, offered for sale and sold "Genuine Pyroil" in the manufacturer's original and sealed containers, at its said stores, as follows:

"69¢—1-Pint Can,
$1.19 1-Quart Can,"

and has continued and is continuing to do so at the time of the filing of this petition.

XIV

That the said wilful acts of the defendant have induced, [fol. 7] coerced and forced other dealers and retailers who have executed contracts with plaintiff, to cancel and threaten to cancel the same, and to refuse to accept further deliveries of Pyroil from plaintiff;

That a further consequence of the said acts of the defendant is that the public is induced to believed the Pyroil products are not worth the prices at which they are nationally advertised and fixed by the manufacturers, and other retailers and dealers cannot market the same at said fixed and advertised prices and threaten to discontinue their sale;

That the warehousing, distribution and marketing of Pyroil is the sole and only business of plaintiff;

That the continuance and marketing of Pyroil by the defendant in the style and manner hereinbefore set forth, will produce great and irreparable injury to plaintiff;

That it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief to plaintiff for loss of sales, destruction of plaintiff's business, and the good will pertaining thereto;

That pecuniary compensation would not afford adequate relief to plaintiff and that restraint is necessary to prevent multiplicity of judicial proceedings;

That the wrongs complained of imminently peril and immediately threaten devastation of plaintiff's business, destruction of its good will, and multiple breaches, violations [fol. 8] and cancellations of its said contracts;

That plaintiff has suffered and will suffer great and irreparable injury for which there is no adequate remedy at law.

XV

That each and all of the acts complained of and herein sought to be enjoined, as hereinafter prayed for, are continuous and continuing in their nature, and great and irreparable injury will result to plaintiff, and the plaintiff will continue to suffer great and irreparable injury as aforesaid unless said defendant be permanently enjoined and restrained from the continuance of the said acts.

Wherefore, plaintiff and petitioner prays:

(1) That the defendant, its agents, officers, attorneys, employees and all persons acting in aid of or in conjunction with it, or any of them, be temporarily restrained immediately and that they be permanently enjoined after a hearing upon the merits of the matter, from, in any manner or by any means, direct or indirect,

(a) Advertising, offering for sale and selling "Genuine Pyroil" and any and all Pyroil products in the Counties of Los Angeles, Orange, San Diego, Imperial, Riverside, San Bernardino, Santa Barbara and Ventura, except at the prices established by the plaintiff and fixed by the manufacturer, namely, $1.00 in Pint containers, $1.75 in Quart [fol. 9] containers and $6.00 in Gallon containers;

(b) Advertising, offering for sale and selling "Genuine Pyroil", and any and all Pyroil products, in said Counties, except in the original, lithographed and sealed containers, bearing the trademark, label, name and copyright of the manufacturer;

(c) Interfering with the business of the plaintiff in the said Counties in any manner contrary to the law of the State of California;

2. That upon the filing of this complaint this Court make and enter its order requiring the defendant and respondent to appear at a time and place therein to be specified then and there to show cause, if any they have, why they should not be enjoined during the pendency of this action from the commission of any of the acts set forth in subparagraphs a, b and c of Paragraph 1 of this prayer;

3. That plaintiff and petitioner have such other and further relief as may be just and equitable, together with its costs herein expended.

John C. Mead, Attorney for Petitioner.

[File endorsement omitted.]

[fol. 10] *Duly sworn to by A. F. H. Payne. Jurat omitted in printing.*

[fol. 11] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

DEMURRER—Filed May 2, 1934

Defendant above-named demurs to the complaint on file herein as follows:

II

That certain act of the legislature of the state of California entitled, "An act to protect trademark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trademark, brand or name," commonly known as the "Fair Trade Act", under and by virtue of the provisions of which said act the within action is sought to be maintained, is void and unconstitutional in that said act is contrary to and in violation of section 1 of Article XIV of the Amendments to the Constitution of the United States, and of sections 11 and 13 of Article I and [fols. 12 & 13] sections 24 and 25 of Article IV of the Constitution of the State of California.

[fol. 14] Wherefore, defendant prays judgment that plaintiff take nothing against it by reason of said complaint, that the same be dismissed, and that defendant have judgment for its costs incurred herein.

Loeb, Walker and Loeb, Attorneys for Defendant.

[fols. 15 & 16] (Endorsed:) No. 372896. Demurrer. Received copy of the within Demurrer this 2 day of May, 1934, John C. Mead, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 17] IN SUPERIOR COURT OF LOS ANGELES COUNTY

No. 372,896

PYROIL SALES COMPANY, INC., a Corporation, Plaintiff,

vs.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA (a Corporation), Defendant

JUDGMENT—Filed July 13, 1934

This matter came on regularly to be heard in Department 34 of the above-entitled Court before the Honorable Emmet H. Wilson, judge presiding, upon an order to defendant herein to show cause why a certain temporary restraining order should not be continued in force pending the within action, and upon the demurrer of defendant to the complaint on file herein. Plaintiff appeared by its attorney, John C. Mead, Esq. and Messrs. Travers, Landels, Weigel and Crocker, amicus curiæ on behalf of plaintiff. Defendant appeared by its attorneys, Messrs. Loeb, Walker and Loeb and by Harry J. Miller, Esq., amicus curiæ on behalf of defendant. Affidavits in support and in opposition to said order to show cause were duly filed and read, and the matter having been duly argued and submitted to the Court for its decision and the Court having duly made an order herein dissolving said temporary restraining order, denying a preliminary injunction and sustaining defendant's [fols. 18-25] demurrer without leave to amend, and plaintiff not having requested leave to amend, Now, Therefore,

It is Ordered, Adjudged and Decreed that plaintiff take nothing by reason of its said complaint on file herein and that the same be and it is hereby dismissed;

It is Further Ordered, Adjudged and Decreed Hereby that defendant have and recover of and from plaintiff its costs incurred herein, which said costs are hereby taxed in the sum of $—.

Dated July 13, 1934.

Emmet H. Wilson, Judge.

[fol. 26] IN SUPREME COURT OF CALIFORNIA

L. A. No. 14954

PYROIL SALES COMPANY, INC. (a Corporation), Plaintiff and Appellant,

v.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA (a Corporation), Defendants and Respondents

OPINION—Filed February 28, 1936

By the COURT:

By stipulation of counsel and order of court, the above-entitled cause was ordered submitted, and to be decided concurrently with Max Factor & Co. et al. v. Kunsman, L. A. No. 14662, decision in which cause has been this day filed.

The appeal here, as in the Factor case, is by the plaintiff from a judgment of dismissal entered after demurrer to the complaint sustained without leave to amend. Although not as extensive in its allegations as the complaint in the Factor case, the complaint is sufficient to raise the same general question of the constitutionality of the 1933 amendment to the "Fair Trade Act" (Stats. 1931, p. 583; Stats. 1933, p. 793). Plaintiff herein seeks an injunction pursuant to the provisions of the act, restraining the defendants from selling Pyroil, a branded and trade-marked article, at retail prices lower than those sought to be maintained by the plaintiff. As in the Factor case, defendants [fol. 27] have not bound themselves by any form of contract to resell the commodity at any specified price, but an obligation to so resell is sought by the plaintiff to be imposed on defendants (by the application of section 1½ of the Fair Trade Act—amendment of 1933) by virtue of the fact that other dealers have agreed with plaintiff not to resell at less than certain prices.

As the questions on appeal are identical in the two actions, the decision in the Factor case is decisive of the general question on appeal in this case. Because of that fact, we do not deem it necessary to consider certain specifications urged in the demurrer that the complaint was

uncertain, ambiguous and unintelligible. Therefore, on the authority of the decision in Max Factor & Co. et al. v. Kunsman, this day filed, the judgment herein is reversed.

Mr. Justice Shenk and Mr. Justice Thompson dissent. (See their opinions filed in Max Factor & Co. et al. v. Kunsman, L. A. No. 14662, filed today.)

[File endorsement omitted.]

[fols. 28-82] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER DENYING REHEARING AND MODIFYING JUDGMENT—Filed March 26, 1936

By the COURT:

The petition for a rehearing herein is denied.

The judgment heretofore entered herein is modified to read as follows: "Therefore, on the authority of the decision in Max Factor & Co. v. Kunsman, L. A. No. 14662, this day filed, the judgment herein is reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed.

Waste, C. J.

Dated March 26, 1936.

[File endorsement omitted.]

[fol. 83] [File endorsement omitted]

[fol. 84] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed April 8, 1936

In connection with its Petition for Allowance of Appeal, filed herewith, defendant The Pep Boys, Manny, Moe & Jack of California, by its attorneys, respectfully presents and files its assignment of errors, upon which it will rely in

the prosecution of its appeal from the judgment of the Supreme Court of the State of California, made and entered herein on February 28, 1936, and modified on March 26, 1936, to-wit:

1. The Supreme Court of the State of California erred in reversing the judgment of the Superior Court of the State of California, in and for the county of Los Angeles, dismissing the complaint herein.

2. Said Supreme Court erred in holding that section 1½ of the Fair Trade Act of the State of California [Cal. Stats. 1933, p. 793] was not repugnant to Article XIV of Amend-
[fol. 85] ments to the Constitution of the United States and did not deny due process of law to said defendant.

3. Said Supreme Court erred in holding that said Fair Trade Act did not deny to defendant the equal protection of the laws within the meaning of Article XIV of Amendments to the Constitution of the United States.

Wherefore, said defendant prays that the judgment of the Supreme Court of the State of California, hereinabove mentioned, be reversed.

Dated April 8, 1936.

Loeb, Walker and Loeb, by Herman F. Selvin, Attorneys for defendant.

[fol. 86] [File endorsement omitted.]

[fols. 87-176] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER ALLOWING APPEAL AND SUPERSEDEAS—Filed April 8, 1936

Good cause therefor appearing,

It is ordered that defendant The Pep Boys, Manny, Moe & Jack of California, a corporation, be and it hereby is granted leave to appeal, to the Supreme Court of the United States, from the judgment of the Supreme Court of the

State of California made and entered herein on February 28, 1936 and modified on March 26, 1936.

It is further ordered that said defendant deposit with the Clerk of this Court its undertaking with sufficient security, in the sum of $500.00, that it will W.H.W. prosecute its appeal to effect and answer all costs and damages that said appeal imposes on plaintiff if said defendant fail to make its plea good, said undertaking to operate as a supersedeas.

Dated April 8, 1936.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 177] IN SUPREME COURT OF CALIFORNIA, BANK

Los Angeles

No. 14954

On Appeal from the Superior Court in and for the County of Los Angeles

Superior Court #372,897

PYROIL SALES COMPANY, INC., (a Corp.), Plaintiff-Appellant;

vs.

THE PEP BOYS, MANNY, MOE & JACK, OF CALIFORNIA (a Corp.), Defendants, Respondents

JUDGMENT—March 26, 1936

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same is hereby reversed, and it is ordered that the trial court enter judgment in the within cause in favor of appellant as prayed. Appellant to recover their costs on appeal.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED ON AND PARTS OF THE RECORD TO BE PRINTED—Filed May 18, 1936

To Charles Elmore Cropley, Esq., Clerk of the Supreme Court of the United States:

In connection with its appeal herein, the appellant above-named intends to rely on the following points:

1. Section 1½ of the California Fair Trade Act as applied against appellant, is arbitrary, and repugnant to the due process clause of Article XIV of Amendments to the Constitution of the United States.

2. The California Fair Trade Act is unreasonably and arbitrarily discriminatory, and repugnant to the equal protection clause of Article XIV of Amendments to the Constitution of the United States.

The parts of the record necessary to a consideration of [fol. 180] the foregoing points are the following:

1. Complaint. (Found at pages 1 to 10, inclusive, of the typewritten record.)
2. Demurrer, omitting paragraphs I, III, IV and V thereof, and also omitting the certificate of counsel thereto. (Found at pages 11 to 15, inclusive, of the typewritten record.)
3. Judgment of the Superior Court of the State of California. (Found at pages 17 to 18, inclusive, of the typewritten record.)
4. Opinion, Order and Judgment of the Supreme Court of the State of California reversing judgment of the Superior Court. (Found at pages 26 to 27, inclusive, of the typewritten record.)
5. Order of the Supreme Court of California denying rehearing and modifying judgment. (Found at page 28 of the typewritten record.)
6. Remittitur of the Supreme Court of the State of California. (Found at page 177 of the typewritten record).

7. Assignment of errors. (Found at pages 83 to 85, inclusive, of the typewritten record.)
8. This statement and proof of service thereof.

Dated May 12, 1936.

Respectfully submitted, Irving M. Walker, Attorney for Appellant. Herman F. Selvin, of Counsel.

[fol. 181] [File endorsement omitted.]

Endorsed on cover: Enter Irving M. Walker. File No. 40,578. California Supreme Court. Term No. 55. The Pep Boys, Manny, Moe & Jack of California, appellants, vs. Pyroil Sales Company, Inc. Filed May 13, 1936. Term No. 55, O. T., 1936.